IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

No. 17-

CURTIS GIOVANNI FLOWERS,

Petitioner,

-vs.-

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

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CAPITAL CASE

Petitioner Curtis Flowers has been tried six times for the same offense in Mississippi state court. Through the first four trials, prosecutor Doug Evans relentlessly removed as many qualified African American jurors as he could. He struck all ten African Americans who came up for consideration during the first two trials, and he used all twenty-six of his allotted strikes against African Americans at the third and fourth trials. (The fifth jury hung on guilt-or-innocence and strike information is not in the available record). Along the way, Evans was twice adjudicated to have violated *Batson v. Kentucky* – once by the trial judge during the second trial, and once by the Mississippi Supreme Court after the third trial.

At the sixth trial Evans accepted the first qualified African American, then struck the remaining five. When Flowers challenged those strikes on direct appeal, a divided Mississippi Supreme Court reviewed Evans' proffered explanations for the strikes deferentially and without taking into account his extensive record of discrimination in this case, and affirmed. Flowers then sought review here, asking: "Whether a prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?" This Court responded by granting certiorari, vacating the Mississippi Supreme Court's judgment, and remanding "for further consideration in light of *Foster v. Chatman*, 136 S. Ct. 1737 (2016)." *Flowers v. Mississippi*, 136 S. Ct. 2157 (2016).

On remand, a divided Mississippi Supreme Court again affirmed. Over three dissents, the state court majority emphasized deference to the trial court, and insisted both that the "[t]he prior adjudications of the violation of *Batson* do not undermine Evans' race neutral reasons," and that "the historical evidence of past discrimination ... does not alter our analysis ...." *Flowers v. Mississippi*, 240 So.3d 1082, 1124 (Miss. 2018). The state court majority then repeated, nearly word-for-word, its previous, history-blind evaluation of Evans' strikes.

Because a prosecutor's personal history of verified, adjudicated discrimination is highly probative of both his propensity to discriminate and his willingness to mask that discrimination with false explanations at *Batson*'s third step, the barely altered question presented is:

> Whether a prosecutor's history of adjudicated purposeful race discrimination may be dismissed as irrelevant when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?

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PETITION FOR A WRIT OF CERTIORARI TO THE
MISSISSIPPI SUPREME COURT

Petitioner, Curtis Giovanni Flowers, prays that a writ of certiorari issue to review the judgment of the Mississippi Supreme Court.

CITATION TO OPINION BELOW

The decision of the Mississippi Supreme Court affirming Flowers' convictions and death sentence after this Court granted Flowers' petition for certiorari, vacated the decision of the Mississippi Supreme Court, and remanded the case for consideration in light of *Foster v. Chatman*, 578 U.S. ___ (2016), is published at 240 So.3d 1082 (2017) ("*Flowers VI(B)*"), and is attached in the Appendix to this petition.

JURISDICTION

The decision of the Mississippi Supreme Court at issue here was announced on November

2, 2017, and Petitioner's timely petition for rehearing was denied on February 22, 2018. *See* Appendix. By order dated May 2, 2018, Justice Alito extended the time to file this petition to and including June 22, 2018.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides: "No State shall ... deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Curtis Flowers, has been tried six times – five times capitally, including the one that produced the judgment challenged here – in connection with a notorious 1996 quadruple homicide at a furniture store in the small town of Winona, Mississippi. There has never been any physical or forensic evidence connecting Flowers to the crime; the motive and methods ascribed to Flowers by the prosecution are objectively improbable; the witnesses relied upon to make up the circumstantial case for guilt have by turns been contradictory, unbelievable, or non-probative.[1] Throughout the half-dozen trials, the prosecution's persistent exclusion of African Americans from

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[1] The specific deficiencies in the prosecution's case against Flowers are detailed at pp. 8-49 of his brief to the Mississippi Supreme Court but omitted from this petition because they do not directly contribute to the concise statement necessary to frame the Question Presented. *See* Sup. Ct. R. 14.1(g). Since Flowers' last petition for certiorari was filed, another prosecution witness has been discredited; after being convicted of a triple homicide, Odette Hallmon recanted his testimony against Flowers – which he says was bought by prosecution promises of lenience. Dave Mann, *Curtis Flowers' Prosecution Witness Says All Testimony Was "Make Believe,"* The Clarion Ledger, June 10, 2018, https://www.clarionledger.com/story/news/2018/06/10/curtis-flowers-case-prosecution-witness-says-he-lied/685575002/.

jury service has been an enduring point of contention.

I. DOUG EVANS' RELENTLESS REMOVAL OF AFRICAN AMERICANS THROUGHOUT THE TRIAL HISTORY OF THIS CASE.

Between them, the first two trials saw the prosecution peremptorily remove all ten African Americans who survived qualification and came up for seats on the jury. In the first trial this tactic resulted in an all-white jury. *See* Clerk's Papers 1656. In the second trial the judge disallowed one of the prosecution's strikes after finding it had been racially motivated; the resulting jury was made up of eleven whites desired by the prosecutors plus the lone African American Evans had been judicially prevented from removing. *See* Clerk's Papers 1662.[2]

Rebuked but undeterred, Evans pressed ahead with a third trial, and once again did his best to ensure that the African-American defendant would be tried by an all-white jury. This time, however, that effort was even more conspicuous as the prosecutor used all fifteen of his peremptory strikes against African Americans. The resulting jury contained one African American, who was seated only after the State's strikes were exhausted. While this tactic produced the desired result at trial – another conviction and death sentence – the victory was again short-lived. On direct appeal the Mississippi Supreme Court declared that the jury selection record presented "as strong a *prima facie* case of racial discrimination as [it] ha[d] ever seen in the context of a *Batson* challenge," *Flowers v. State*, 947 So.2d 910, 935 (Miss. 2007) ("*Flowers III*"), and went on to hold that the record "evince[d] an effort by the State to exclude African Americans from jury service,"

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[2] The convictions and death sentences obtained in the first and second trials were reversed for prosecutorial misconduct unrelated to jury selection. In the first, the prosecution was found to have acted "in bad faith" during improper cross-examination of a defense witness, *Flowers I*, 773 So.2d at 328-30, and in the second trial, the prosecution was caught having "repeatedly argued facts not in evidence" while attempting to repair damaging holes in its proof. *Flowers II*, 842 So.2d at 555-56.

id. at 937.

In contrast to the earlier proceedings, and for reasons not disclosed on the record, at the fourth trial the prosecutors elected to try the case non-capitally. Among other things, this eliminated the step of "death-qualifying" prospective jurors, and with it, the opportunity to remove a disproportionate number of African Americans for "cause." While the prosecutors sought to compensate by using all eleven of the peremptory strikes they exercised against African Americans, the resulting jury – seven whites and five African Americans – was far more reflective of the community than prior juries had been. *See* Clerk's Papers 1667-68. After hearing the evidence, the jurors were unable to reach consensus on the question of Flowers' guilt and a mistrial was declared. The available record concerning the fifth trial is sparse, but it also ended in a mistrial when the jury was unable to reach a unanimous verdict at the guilt-or-innocence phase. *See* Clerk's Papers 1891.

All told, through the four trials for which the record contains data, Evans:

- Used thirty-six (36) peremptory strikes against African Americans;
- Struck *every* qualified African American at each of the first three trials, all of which were capital, except for one left on the venire of the third trial when the prosecution had no remaining strikes; and
- Directed every one of the eleven (11) strikes exercised at the fourth trial against African Americans.

The sixth trial, like all but the fourth, proceeded as a capital case and largely marked a return to prosecution tactics that had been successful (albeit not in a lasting way) in earlier trials. While the prosecutors did adjust their jury selection tactics to lessen their vulnerability to a *Batson* objection – *e.g.*, by aggressively questioning African Americans to generate challenges for cause

and facially plausible bases for peremptory challenges – they still exercised strikes against five of the six African Americans tendered for consideration, and managed to seat a jury containing eleven whites out of an original venire that was 42% African American. The revival of the prosecution's strategy from the first three trials brought a familiar result: Flowers was once again convicted and sentenced to death.

Flowers appealed, contending, *inter alia*, that the prosecution had once again violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by exercising its peremptory strikes on the basis of race. A divided Mississippi Supreme Court affirmed. The court split 6-3 over Flowers' *Batson* challenge. Although the prosecutor, Doug Evans, had long since distinguished himself – in this very case – as an especially willful and recalcitrant *Batson* violator, the Mississippi Supreme Court majority failed even to acknowledge, let alone consider, that well-documented history. *Flowers v. State*. 158 So.3d 1009 (Miss. 2014) ("*Flowers VI(A)*").[3] Instead, the majority confined itself to a narrow, mechanistic evaluation of the disparities in the prosecutor's approach to black and white veniremen, afforded him the benefit of the doubt where the evidence was open to interpretation, and credited his claims of race neutrality without hesitation.[4] Three justices dissented, criticizing the majority for ignoring the compelling facts of the prosecutor's history of race discrimination in

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[3] "*Flowers VI(A)*" refers to the first Mississippi Supreme Court opinion reviewing his conviction and death sentence at the sixth trial; "*Flowers VI(B)*" refers to its opinion reviewing the same conviction and death sentence after this Court's GVR in light of *Foster*.

[4] The majority's accommodating approach toward the prosecution was not limited to its treatment of the *Batson* issue. As the dissent noted, the majority also turned a blind eye toward the prosecution's repetition of some of the same closing argument misconduct that had led to reversal in *Flowers II*. *See Flowers VI(A)*, 158 So.3d at 1084 (King, J., dissenting) ("The Majority in today's case, by endorsing the prosecutor's misstatements — the same misstatements which warranted reversal in *Flowers II* — takes Mississippi one step closer to having misrepresentation of the facts presented at trial commonplace in our trial courts.")

the same case, *Flowers VI(A)*, 158 So.3d at 1089 (King, J., dissenting), and countering the majority's "robotic" acceptance of the prosecution's account with their own detailed comparative analysis – informed by history and other probative circumstances – demonstrating that the prosecutor had, for (at least) a third time, in fact, discriminated on the basis of race, *id.* at 1100.

II. THE FIRST PETITION, GVR, AND THE JUDGMENT CHALLENGED IN THIS PETITION.

Flowers' petition for certiorari raised only one jury selection issue: "Whether a prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?" While his petition was pending, this Court decided *Foster v. Chatman*, 578 U.S. ___, 136 S.Ct. 1737 (2016), reversing a Georgia court that had rejected a claim of racial discrimination in the exercise of a prosecutor's peremptory challenge. This Court then granted Flowers' petition, vacated the state court's judgment, and remanded the case for consideration in light of *Foster*. *Flowers v. Mississippi*, 579 U.S. ___, 136 S.Ct. 2157 (2016) (Mem.).

Flowers filed a Supplemental Brief with the Mississippi Supreme Court, arguing that this Court's GVR required evaluation of the evidence of discrimination *in light of Evans' history of discrimination* – as his petition for certiorari had urged – and demonstrated that analysis for the state court. The State failed to join issue; after several digressions,[5] it purported to defend each

[5] First the State argued that GVRing the case was wrong, though without explaining how its position on the wisdom of an order by this Court could alter the state court's duty to follow that order. Next it asserted that there was no reason to think that the GVR was focused on the relevance of the prosecutor's history of discrimination, though without offering an alternative explanation of the purpose of the order. Then it argued that the prosecutor in this case had no history of discrimination in jury selection, despite the fact that Mississippi courts twice – in this same case – adjudicated him to have discriminated in the exercise of his peremptory challenges. The State even revived its argument that Flowers failed to establish a *prima facie* case, though neither the trial

of the challenged strikes, but without any reference at all to the prosecutor's history of discrimination.

The Mississippi Supreme Court again affirmed, again over three dissents. The bulk of the majority opinion is – virtually word for word, with an occasional citation added – the same history-blind analysis that comprised its prior opinion. Indeed, immediately preceding its repetition of that analysis the court underlined its adherence to that ahistorical approach: "[T]he historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*." *Flowers VI(B)*, 240 So.3d at 1124.

Three things distinguish the post-GVR majority opinion from the pre-GVR opinion. The post-GVR opinion does address *Foster*. However, at no point did the majority undertake to reconsider its decision in light of *Foster* in the way Flowers' brief (or the dissent) urged, or even to inquire why this Court might have GVRed the initial decision for reconsideration in light of *Foster*. Instead, its discussion of *Foster* is largely limited to recounting that case's factual details, a recitation prefaced by the disclaimer that "*Foster* in no way involved a particular prosecutor's history of adjudicated *Batson* violations." *Flowers VI(B)*, 240 So.3d at 1118. Without explanation of either its moral or evidentiary calculus, it concludes: "The prior adjudications of the violation of *Batson* do not undermine Evans' race neutral reasons as the despicable jury selection file in *Foster* undermined the prosecutor's race neutral explanations." *Flowers VI(B)*, 240 So.3d at 1124.

The second difference between the two opinions is an assertion that deference is due to the

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court nor the state supreme court had bought that argument the first time around, and the State itself had declined to make it in its Brief in Opposition to the Petition for Certiorari.

trial judge's determination because "Flowers' counsel ensured that the trial court consider [sic] the totality of the circumstances, including historical evidence of racial discrimination by the district attorney," and that "the trial court certainly considered circumstances surrounding the previous trials." *Flowers VI(B)*, 240 So.3d at 1123. In support of this assertion, the court cites four ***arguments made by defense counsel*** that address the prior history of discrimination. It then quotes two of the trial court's responses to those arguments, neither of which reflects any "consideration" of that history. The first quoted response was not even made during the *Batson* hearing; it simply denies the request that the prosecution be prohibited from exercising any peremptory challenges, declaring that the *Batson* reversal in an earlier case was irrelevant. *Flowers VI(B)*, 240 So.3d at 1122–23. The other quoted response had nothing at all to do with prosecutor's prior discrimination, but was an assertion of the trial judge's perception that the two trials were similar in that many potential jurors knew the defendant. *Flowers VI(B)*, 240 So.3d at 1123–24.

The third difference between the two opinions is that the post-GVR version did – albeit briefly – address Flowers' contention that *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), compelled consideration of Evans' history. However, it did so only to reject the comparison, stating: "The Court does not have before it [sic] of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller-El II*." *Flowers VI(B)*, 240 So.3d at 1124 (citing *Miller-El II*, 545 U.S. at 266). The opinion offers no explanation for why the policy of an ***office*** – adopted when that policy had not yet been declared unconstitutional – would be more probative of willingness to lie and/or willingness to violate the Constitution than would be the prior adjudicated, unconstitutional discrimination of the ***individual*** whose credibility was at stake.

REASONS THE WRIT SHOULD BE GRANTED

I. A PROSECUTOR'S HISTORY OF ADJUDICATED PURPOSEFUL RACE DISCRIMINATION MUST BE CONSIDERED WHEN ASSESSING THE CREDIBILITY OF HIS PROFFERED EXPLANATIONS FOR PEREMPTORY STRIKES AGAINST MINORITY PROSPECTIVE JURORS.

The second time District Attorney Doug Evans tried Curtis Flowers, the trial court[6] found he had discriminated in the exercise of his peremptory challenges, and remedied that discrimination by seating an African American juror that Evans had struck on account of race.[7] This correction did not diminish Evans' determination to discriminate; in the next retrial of this case, *Flowers III*, the State exercised all fifteen of its peremptory strikes against African Americans. This time the discrimination was so blatant that the Mississippi Supreme Court not only reversed, but characterized the case as presenting "as strong a *prima facie* case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Flowers III*, 947 So.2d at 935.

In his sixth attempt to convict Flowers,[8] Evans made two small gestures toward covering his tracks: He accepted the first black juror before striking the remaining five, and he utilized wildly disparate questioning in an attempt to thwart the kind of comparative juror analysis that had

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[6] *Flowers II* and *Flowers VI* were presided over by different trial judges.

[7] Recall that the prosecution had also removed every African American from the jury in *Flowers I*.

[8] Recall further that Evans used all eleven of his peremptory strikes against African Americans at *Flowers IV* (and that there is no record of his strikes in *Flowers V*).

led to reversal in *Flowers III*. It was enough. In evaluating the evidence of purposeful racial discrimination in this retrial by the same prosecutor, the Mississippi Supreme Court refused to even *acknowledge* the very proximate history of discrimination. As the three dissenting justices objected, "To not consider this history is to rebuff *Batson*'s direction that 'all relevant circumstances' must be considered." *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted).

After a GVR from this Court, the Mississippi Supreme Court made its own small gesture: It acknowledged Evans' history, but only to dismiss it as irrelevant.

A. THIS COURT'S RELEVANT PRECEDENT.

The Equal Protection Clause of the Fourteenth Amendment prohibits racial discrimination in the exercise of the challenge. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). Striking even a single juror based upon race, violates the Fourteenth Amendment. *Id.* at 95.

The party objecting to a peremptory strike "must first make a *prima facie* showing that race was the criteria for the exercise of the peremptory strike." *Batson*, 476 U.S. at 96-97. Upon such a showing, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97. Finally, the trial court must determine whether the race neutral explanation is a pretext for racial discrimination. *Id.*

In order to determine whether to credit a prosecutor's facially neutral reasons, this Court has made plain that "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008) (citing *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (*Miller-El II*)). Among the factors this Court has found to "bear upon the issue of racial animosity" are the strength of the *prima facie* case, *Miller-El II*, 545 U.S. at 240; "side-by-

side comparisons of some black venire panelists who were struck and white panelists allowed to serve," *id.* at 541; "contrasting *voir dire* questions posed respectively to black and nonblack panel members," *id.* at 255; and mischaracterization of the evidence, *id.* at 244.

Finally, and most pertinently here, this Court has also determined that a history of racial discrimination by the prosecuting office is probative. *Miller-El II*, 545 U.S. at 266 ("If anything more is needed for an undeniable explanation of what was going on, history supplies it."). As the three dissenters below pointed out, "[i]f the history of discrimination by a district attorney's office is a permissible consideration under *Batson*, surely the history of ***the same prosecutor in the retrial of the same case*** is a legitimate consideration." *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted) (emphasis in original); *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted).

The object of this multi-factor inquiry is to evaluate the prosecutor's credibility, *i.e.*, to determine whether his proffered justifications "should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991). To that end, it is hard to imagine a better predictor of willingness to deceive than a documented history of dishonesty on the very matter at issue. Reams of impeachment law rest upon the firmly established proposition that propensity to be untruthful matters. Indeed, were this a criminal case, evidence of Evans' method of cloaking his discriminatory jury selection practices in bogus explanations would be admissible as ***substantive*** evidence of his "motive," "intent," "plan," or "absence of mistake." Fed. R. Evid. 404(b)(2); Miss. R. Evid. 404(b)(2). Thus, consideration of the history of the same prosecutor in prior trials of the same case is mandated both by *Miller-El*'s specific directive to consider a history of racial discrimination by the prosecuting office, and by *Batson*'s broader insistence that the trial judge must evaluate the

credibility of the prosecutor. *See also, Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252, 267 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

B. THE STATE COURT'S PERSEVERATIVE ERROR.

In this case, Evans' propensity to discriminate and his willingness to falsely deny his discriminatory intent are beyond argument; he has been adjudicated to be both an egregious violator of *Batson*'s command, and a repeat offender.[9] Despite the indisputable, judicially-determined fact of prior discrimination and deception, and despite the clarity of this Court's instructions in *Batson, Miller-El,* and *Snyder*, the Mississippi Supreme Court has – twice – refused to consider that history in evaluating the race neutral reasons Evans proffered.

1. Total White-out in *Flowers VI(A)*.

When first confronted with the proof that Evans discriminated in selecting the jurors who would serve in Flowers' sixth trial, the Mississippi Supreme Court steered its own course and completely ignored Evans' prior record. At no point in its evaluation of the evidence of discrimination did the majority assign any weight to Evans' history of racial discrimination, consider the way in which that history should influence interpretation of the other evidence of

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[9] As noted *supra*, in *Flowers III*, the State exercised all fifteen of its peremptory challenges against African Americans, twelve against potential jurors, and three against potential alternates, *Flowers III*, 947 So.2d at 916. The Mississippi Supreme Court found two clear *Batson* violations, and three more highly suspicious strikes where, in each case, the State offered multiple explanations, some of which were contradicted by the record, while others could not be rebutted. *Flowers III*, 947 So.2d at 936 ("While there was sufficient evidence to uphold the individual strikes of Golden, Reed, and Alexander Robinson under a 'clearly erroneous' or 'against the overwhelming weight of the evidence' standard, these strikes are also suspect, as an undertone of disparate treatment exists in the State's *voir dire* of these individuals.").

discrimination, or in any other way consider the probative value of that history. Indeed, at no point in its *Batson* discussion did the majority even *mention* the historical facts surrounding the claim of racial discrimination in the third trial, its own emphatic characterization of those facts as constituting "as strong a *prima facie* case of racial discrimination as we have ever seen in the context of a *Batson* challenge," *Flowers III*, 947 So.2d at 935, or its own determination that Evans' racial discrimination in jury selection compelled reversal of the conviction.[10]

Even the state court's recitation of the factors for evaluating pretext was silent concerning prior history. According to the majority, five indicia of pretext should be considered when analyzing the race-neutral reasons for a peremptory strike: (1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge; (2) the failure to *voir dire* as to the challenged characteristic cited; (3) the characteristic cited is unrelated to the facts of the case; (4) lack of record support for the stated reason; and (5) group-based traits. *Flowers VI(B)*, 240 So.3d 1121 (internal citations omitted); *Flowers VI(A)*, 158 So.3d at 1047 (internal citations omitted). Although the state court's list overlaps with some of the criteria this Court recognized as probative in *Miller-El*, it omits both the strength of the *prima facie* case and the prior history of discrimination.

These omissions could not have been inadvertent. The Mississippi Supreme Court's own prior adjudication of discrimination should have made the history salient; if it did not, Flowers' briefing of the *Batson* issue identified "the very proximate history of discrimination" as the *first*

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[10] The majority opinion contains no reference to the outcome of *Flowers III* in its discussion of Flowers' *Batson* claim. It does note the holding of *Flowers III* in a separate section recounting the procedural history of the case, *Flowers VI(A)*, 947 So.2d at 1022, and in the course of discussing a venire selection claim - a discussion that occurs after the conclusion of the discussion of the Batson claim. *Id.* at 1059.

indicium of discrimination to be considered; and if that still were not enough, the three dissenters specifically protested that the majority's failure to take account of history in this case was contrary to *Batson*'s direction that "all relevant circumstances" must be considered, *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted); *Flowers VI(A)*, 158 So.3d at 1088 (King, J., dissenting) (internal citations omitted). The majority, however, neither disputed the charge that it had disregarded probative history, nor attempted to defend its deviation from this Court's precedents. It was as if Evans' history, and the arguments concerning the probative value of that history, did not exist.

2. Explicit Dismissal of Evans' History in *Flowers VI(B)*.

Flowers' petition for certiorari raised only one jury selection issue: "Whether a prosecutor's history of adjudicated purposeful race discrimination must be considered when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors?" This Court called for the record, then granted certiorari, vacated the state court's judgment, and remanded the case for consideration in light of *Foster*. *Flowers v. Mississippi*, 579 U.S. ___, 136 S. Ct. 2157 (2016) (Mem.).

A GVR is appropriate "[w]here intervening developments, or recent developments that [this Court has] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996). A lower court is not compelled to reverse a GVRed decision, but it *is* required to reconsider that decision. One member of the *Flowers VI(A)* majority, Chief Justice

Waller, faithfully did so, and in *Flowers VI(B)* joined Justice King's dissent.[11] The rest of the majority, however, instead rationalized why they need *not* do so.

Given the holding in *Foster* and the question posed in Flowers' petition, there is only one plausible interpretation of the GVR.[12] As in *Foster*, only the third step of *Batson* – determination of whether facially neutral reasons are pretextual – was at issue. "That step turns on factual determinations, *and in the absence of exceptional circumstances*," as this Court stated in *Foster*, "[a reviewing court should] defer to state court factual findings unless [it] conclude[s] that they are clearly erroneous." *Foster*, 136 S. Ct. at 1747 (citing *Snyder*, 552 U.S. at 477) (emphasis added). Thus, upon remand the state court was obliged to focus on the "exceptional circumstances" that prompted this Court to GVR the case, and reconsider the question of pretext in light of those circumstances to avoid a "clearly erroneous" result. Nonetheless, nowhere in the majority opinion is there an evaluation of the likelihood that Evans would do what he had done – at least twice – before, nor is there any consideration of the other evidence of discrimination in light of what Evans had shown himself willing to do. Rather, after citing three reasons for not conducting such an analysis, the majority – nearly word for word – simply pasted in its prior opinion. Before doing so, it proclaimed its adherence to an ahistorical approach: "[T]he historical evidence of past discrimination presented to the trial court does not alter our analysis, as set out in *Flowers VI*." *Flowers VI(B)*, 240 So.3d at 1124.

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[11] Despite the chief justice's reconsideration and shift to the dissent, there were three dissenting votes on the *Batson* issue in *Flowers VI(B)*, just as in *Flowers VI(A)*, because Justice Dickinson, who joined Justice King's dissent in *Flowers VI(A)*, had stepped down.

[12] Although the State's brief disputed this interpretation, it offered no alternative.

C. THE MAJORITY'S REASONS FOR REFUSING TO EVALUATE THE EVIDENCE OF PRETEXT IN LIGHT OF EVANS' HISTORY.

Of the majority's three reasons for refusing to consider the probative value of Evans' adjudicated prior history discrimination and his past willingness to provide false explanations of his strikes to courts, one is unsupported by the record, and all three reflect a crabbed view of *Batson* that cannot be squared with this Court's precedents.

1. The deference due the trial court's purported consideration of Evans' history of discrimination and dishonesty.

A majority of the Mississippi Supreme Court articulated its role in reviewing *Batson* claims in a particularly self-limiting way: It gives "great deference to the trial court's determinations under *Batson* and will reverse only if the trial court's decision is clearly erroneous *or against the overwhelming weight of the evidence.*" *Flowers VI(B)*, 240 So.3d at 1121 (emphasis added). But what is important is not the "overwhelming weight of the evidence" gloss on this Court's language, but whether its application can be squared with this Court's precedents. First, it is important to note that any state court gloss must allow for the possibility that in some cases, the trial court's decision *will* be clearly erroneous; after all, *Miller-El* and *Snyder* are such cases. But more importantly, as this Court set forth in *Foster*, the clearly erroneous standard applies only "in the absence of exceptional circumstances." *Foster*, 136 S. Ct. at 1747. Evans' history of discrimination *is* extraordinary: Most prosecutors manage to avoid being adjudicated as a *Batson* violator even once; prosecutors with *two* such adjudications are rare; and a prosecutor with two such adjudications in prior trials of the *same defendant* is virtually unparalleled.

The state court majority also quotes *Snyder*'s observation that "the best evidence of

discriminatory intent often will be the demeanor of the attorney who exercises the challenge[.]" *Flowers VI(B)*, 240 So.3d at 1121 (quoting *Snyder*, 552 U.S. at 477). But "often" is not always, and an obvious exception is when the subject of the inquiry has previously shown himself willing and able to maintain an earnest demeanor while making statements later determined to be false. That very sequence unfolded in *Flowers III*, as the trial court had been taken in by Evans' explanations – presumably delivered with a reassuring demeanor – for using all fifteen of his strikes against African Americans, but the Mississippi Supreme Court later held in no uncertain terms that at least some of those explanations were pretextual, *i.e.*, false.

The trial judge in *Flowers VI* was not the same judge who was fooled by Evans' demeanor in *Flowers III*, and certainly he *could* have taken Evans' prior history of discrimination, dishonesty, and ability to deceive into account. Indeed, the state court majority asserts that he *did* take it into account, but there is absolutely no evidence in the record supporting that assertion. The majority quotes at length trial counsel's four arguments that Evans' history mattered, but it offers no language at all suggesting that the trial court either shared counsel's view or acted on it. Only two trial court responses to those arguments are quoted, neither of which reflects any "consideration" of that history. The first quoted response was not made during the *Batson* hearing, and denies the request that the prosecution be prohibited from exercising any peremptory challenges, declaring that the prior *Batson* reversal was irrelevant. *See* Tr. 1739 ("But because Flowers III was reversed on Batson is certainly no grounds for saying that they should now be denied the right to use peremptory."). The second quoted response contains literally nothing about prior discrimination, but simply asserts the trial judge's perception that in both trials many potential jurors knew the defendant. *See* Tr. 1738–39 ("But you know full well from past

experiences in this county because of the number of people that know Mr. Flowers . . . there is nothing that has - - that has - - no discrimination that's occurred that has caused this, what you call, statistical abnormality now. It is strictly because of the prominence of his family."). That the trial judge's response did not acknowledge or adopt the historical concern articulated by defense counsel should come as no surprise, for while the state court majority touts it as a reaction to counsel's argument, the trial court's statement was actually made *before* the argument was. *Compare Flowers IV(B)*, 240 So.3d at 1123 (quoting defense counsel at Tr. 1764–65; Tr. 1766–67; Tr. 1788–89) *with Flowers IV(B)*, 240 So.3d at 1123–24 (quoting the trial judge at Tr. 1738–39). Combing the *Batson* hearing transcript produces no language from the trial court that can plausibly be read either as weighing the history of discrimination, or as considering other evidence of discrimination in light of that history.

2. The probative value of Evans' history of discrimination and dishonesty as compared to that of the historical evidence of discrimination present in *Miller-El*

Flowers VI(A) did not even mention historical evidence of discrimination as a possible indicium of discrimination. *Flowers VI(B)* does acknowledge that *Miller-El* attaches probative value to prior history, but then dismisses that precedent with a remarkable comparison: "The Court does not have before it [sic] of a similar policy of the district attorney's office or of a specific prosecutor that was so evident in *Miller-El II*." *Flowers VI(B)*, 240 So.3d at 1124.

True, the prior policy of an office is not the *same* thing as the adjudicated discrimination of the prosecutor himself. But on every plausible point of comparison, Evans' prior history is *more* probative of discriminatory intent than was the historical evidence in *Miller-El*. A *policy* is less probative than a confirmed *action*, particularly an action *taken more than once*. A practice

taken against *the same defendant in a trial of the same case* is more probative than a practice in *an unrelated case*. A policy adopted by an *office* is less probative than an action taken by very same *person* whose credibility is being evaluated. An action taken *after a practice is declared illegal* is more probative of willingness to break the law than is an action taken before such a declaration. Both Flowers' brief and the dissent point out the reasons to assign more weight to the historical evidence in this case than that presented in *Miller-El*, yet the majority opinion offers no explanation for how its dismissal of the probative value of the evidence here is consistent with *Miller-El*'s treatment of the same species of evidence.

3. The moral comparison between Evans' history of racial discrimination and placing the letter "B" before the names of African-American jurors.

At least as strange as the dismissive comparison to *Miller-El* is the majority's marginalization of *Foster*. Rather than attempting to discern guidance from *Foster* in accordance with this Court's mandate, the majority makes an obvious but unhelpful distinction: "*Foster* in no way involved a particular prosecutor's history of adjudicated *Batson* violations." *Flowers VI(B)*, 240 So.3d at 1118. Then without elaboration it concludes: "The prior adjudications of the violation of *Batson* do not undermine Evans' race neutral reasons as the despicable jury selection file in *Foster* undermined the prosecutor's race neutral explanations." *Flowers VI(B)*, 240 So.3d at 1124. This statement is remarkable in two ways. First, there is no explanation of why the prior adjudicated *Batson* violations "do not undermine Evans' race neutral reason." How can that be? Surely the fact that a person gave race neutral reasons in a very, very similar situation in the past, *and those reasons were not true*, "undermines" the likelihood that new race neutral explanations, given in response to similar arguments from the same opponent, are true.

And second, why is it that the jury selection file in *Foster* was more "despicable" than was Evans' actual, purposeful discrimination in the exercise of his peremptory challenges in two prior trials? What is "despicable" – and, more importantly, unconstitutional – is racially biased decision-making. The "B" notations in *Foster* were a telltale sign that constitutionally forbidden racial bias was afoot; the prior adjudications of *Batson* violations in this case are firm proof that action in service of such bias was taken by Evans. To suggest that the former matters in a *Batson* step-three analysis but the latter does not – as the state court majority did here – is to misunderstand the object and operation of that analysis completely.

Taken together, the majority's attempts to distinguish this case from *Miller-El* and trivialize *Foster* suggest a fundamental error: It reads this Court as more concerned with prohibiting embarrassingly obvious *markers* of racial discrimination than it is with eradicating the discrimination itself. But the Equal Protection Clause of the Fourteenth Amendment does not command *discrete* racial discrimination, it forbids racial discrimination, and taken together, *Batson*, *Miller-El*, and *Foster* insist that courts must be willing to examine the entire record to determine whether such discrimination is present.

II. THE STATE COURT'S DISMISSAL OF THE PRIOR PROXIMATE HISTORY OF DISCRIMINATION WAS OUTCOME DETERMINATIVE.

The State's brief to the Mississippi Supreme Court following the GVR conspicuously omits any effort to explain why, even evaluated in light of Evans' history in this case, the cumulative evidence of discriminatory intent did not establish pretext. The reason for that omission is simple: As dissenting Justice King's opinions – each joined by two other justices – painstakingly demonstrate, when the other evidence of discrimination is evaluated in light of Evans' history, the proffered reasons for his strikes are obviously pretextual.

As the dissenters carefully noted, "On its own, [Evans' prior history of discrimination] is not dispositive of a finding of racial discrimination." *Flowers VI(B)*, 240 So.3d at 1160 (King, J., dissenting) (internal citations omitted); *Flowers VI(A)*, 158 So.3d 1009, 1088 (2014) (King, J., dissenting) (internal citations omitted). Evans could have – and *should* have – learned the constitutional mandate of racial neutrality from the Mississippi's Supreme Court's rebuke in *Flowers III*, even though he clearly had not learned it from the trial court's finding of discrimination in *Flowers II*. Another prosecutor might have. But Evans did not.

The opinion in *Flowers III* - like the trial court's reinstatement of an African-American juror in *Flowers II* - neither rehabilitated nor deterred Evans. Instead, the Mississippi Supreme Court's opinion taught him the only lesson he was willing to learn: how to avoid the most obvious markers of racial motivation. In Flowers' sixth trial, Evans accepted the first African American juror who survived for-cause challenges – then struck the remaining five. This time he asked enough questions and gave enough reasons for each juror he struck to avoid making it *blatantly* obvious which of his reasons were pretextual. Close examination, however, shows greater cunning, but the same purposeful discrimination on the basis of race. Evans' questioning of African-American jurors was grossly disparate; his responses to similar *voir dire* answers varied with the juror's race; at several points he mischaracterized the responses of African-American jurors; and he even resorted to out-of-court investigation of an African-American juror in a desperate effort to generate a reason to strike her. *See Flowers VI(B)*, 240 So.3d at 1166–67 (King, J., dissenting); *Flowers VI(A)*, 158 So.3d at 1095 (King, J., dissenting). When this other evidence of pretext is considered *alongside Evans' history of discrimination* – as mandated by *Miller-El*, as faithfully undertaken by the dissenters, and as directed by the GVR in light of *Foster* – the

Mississippi Supreme Court's interpretation of these other indicia of discrimination becomes untenable.

A. THE STRENGTH OF THE *PRIMA FACIE* CASE.

Both the *Flowers VI(A)* majority opinion and the *Flowers VI(B)* majority opinion fail to consider the strength of the *prima facie* case at all.[13] In contrast, after noting the necessity of considering the history of discrimination, the three dissenting justices made detailed observations about the significance of the strength of the *prima facie* case, concluding that both the numbers and the suspicious timing of the strikes "reveal a clear pattern" of disparate treatment.[14]

B. DISPARATE QUESTIONING.

The disagreement between the majority and dissent over whether Evans' history of

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[13] In *Flowers III*, the Mississippi Supreme Court *had* commented on the strength of the prima facie case, and offered no reason for its failure to consider that factor in *Flowers VI*.

[14] *Flowers VI(B)*, 240 So.3d at 1060–61 (King, J., dissenting) (transcript citations omitted); ("Like the history of today's case, a review of the statistics relating to the prosecutor's use of peremptory strikes is not, standing alone, dispositive of the *Batson* inquiry. These numbers, however, reveal a clear pattern of disparate treatment between white and African–American venire members. . . The original venire consisted of forty-two percent African Americans. After the jury qualification and initial for-cause challenges, the venire consisted of twenty-eight percent African Americans. Ultimately, one African American served as a juror and one African American served as an alternate juror. Despite the initial venire consisting of forty-two percent African Americans, the jury that convicted and sentenced Flowers consisted of eight percent African Americans. ... Evans accepted the first African American juror . . . but even this decision was suggestive of racial bias, the State's treatment of Robinson suggests it was attempting to insulate subsequent challenges by accepting a token black juror. The *voir dire* was brief. Moreover, although Robinson raised his hand during group *voir dire* to indicate he knew [a relative of Flowers] he was not further questioned by the State on this relationship. In contrast, when Evans offered race-neutral reasons for striking African-American juror Dianne Copper, he pointed to the fact Copper indicated she knew [Petitioner's relative]. This is suspicious, even though standing alone, it proves little. The State then struck all of the remaining five African American potential jurors. ... (Indeed, looked at another way, the State struck all of the African American *women* potentially available for selection as jurors.)."); *Flowers VI(A)*, 158 So.3d at 1090 (King, J., dissenting) (transcript citations omitted) (same).

discrimination was relevant also affected the scrutiny each afforded the evidence of disparate questioning. The majority seemed most focused upon disparaging the probative value of disparate questioning evidence, insisting not once but three times that disparate questioning "alone" cannot establish racial motivation. *Flowers VI(B)*, 240 So.3d at 1125; 1126; 1135; *Flowers VI(A)*, 158 So,3d at 1048; 1049; 1057. This statement is likely an erroneous characterization of the law; a case with no questioning of any white jurors and extensive questioning of all black jurors might without more establish purposeful discrimination. But more importantly, the premise was obviously erroneous: Evans' disparate questioning did not stand "alone," but at the very least, was accompanied by a strong *prima facie* case and a distinctive history of prior discrimination.

Moreover, the majority's view of the evidence of disparate questioning was unduly deferential toward the state's contentions:

> The State's assertion that elaboration and followup questions were needed with more of the African-American jurors is supported by the record. Most of the followup questions pertained to the potential juror's knowledge of the case, whether they could impose the death penalty, and whether certain relationships would influence their decision or prevent them from being fair and impartial. The jurors who had heard little about the case, who said they would not be influenced by what they had heard, and who said they would not be influenced by relationships were asked the fewest questions. The jurors who knew more about the case, who had personal relationships with Flowers's family members, who said they could not be impartial, or who said they could not impose the death penalty were asked more questions.

Flowers VI(B), 240 So.3d at 1125; *Flowers VI(A)*, 158 So.3d at 1048. Although these generalizations are largely true – *more* African-American jurors knew the parties, *most* of the follow-up questions pertained to relevant matters, *more* questions were asked of jurors who had personal relationships about the case, or qualms about the death penalty – this trusting reliance on

reassuring generalizations was not appropriate given Evans' history. On the contrary, in light of that history, it was incumbent upon a reviewing court to probe whether those generalizations provided a *full* explanation for the disparities.

When the dissent approached the matter of disparate questioning, it did so with appropriately greater skepticism, and came to a different conclusion:

> An analysis of the number and type of questions asked by the prosecutor further reveals a pattern of disparate treatment. During individual *voir dire*, the prosecutor asked white jurors an average of approximately three questions. African-American jurors, however, were asked approximately ten questions each by the prosecutor.
>
> Further, in what appears to be mere lip service to the *voir dire* process, when questioning most white jurors during individual *voir dire*, the prosecutor essentially repeated questions that the trial court had just asked. The trial court asked each juror standard death-penalty-qualification questions. The prosecutor would then—in substance—ask the same questions and then hand the juror off to be questioned by the defense. The prosecutor asked only nine percent of white jurors something beyond these duplicated questions.
>
> In a stark contrast, the prosecution asked sixty-three percent of African-Americans questions outside of the standard death-penalty-qualification questions. As an example, fifty-five percent of African-American jurors who had some kind of connection to the Flowers family (through work, the community, or family) were asked questions by the prosecutor about this connection. Although five white jurors had similar connections to the Flowers family (through work and the community), the prosecutor failed to ask any questions about these connections.
>
> As noted in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), statistical analysis can raise a question as to whether race influenced the jury selection process. The numbers described above are too disparate to be explained away or categorized as mere happenstance.

Flowers VI(B), 240 So.3d at 1061 (King, J., dissenting); *Flowers VI(A)*, 158 So.3d at 1089 (King, J., dissenting).

In addition, when an apparently acceptable African-American juror was in the box, the

State asked highly leading questions, plainly trolling for an excuse for a strike.[15] Careful parsing of questioning is important, for absent vigilance – vigilance which was particularly appropriate given Evans' prior history of discrimination – disparate questioning can obstruct comparative juror analysis. Had the majority been vigilant, it would have been primed to conclude that, because "the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual." *Miller-El v. Cockrell*, 537 U.S 322, 344 (2003) (*Miller-El I*). Instead, given its disregard of Evans' history, it accepted the State's explanation for disparate questioning at face value.

C. COMPARISONS OF STRUCK BLACK JURORS AND SEATED WHITE JURORS.

A comparison of the majority's and dissent's approaches to individual struck African-American jurors reveals the further impact of their divided views on the significance of history. The majority and dissent agree that the strike of one of the African-American jurors was supported

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[15] For example, when African-American prospective juror Diane Copper stated she previously worked at Shoe World at the same time Cora Flowers was employed there, Tr. 770–71, Evans attempted to lead her into saying that the relationship was a close one:

EVANS:	How long did you work with Cora?
COPPER:	I can't remember the exact – probably about a year or something like that.
EVANS:	Okay. Were y'all pretty close?
COPPER:	It was more like a working relationship, you know.
EVANS:	Did you ever visit with each other?
COPPER:	No, sir.

Tr. 973. Later, Evans again tried to lead Copper into admitting that her relationships with defense witnesses "would be something that would be entering into your mind if you were on the jury, wouldn't it?" Tr. 1407. In contrast, the State accepted without any inquiry similar assurances of relationships being purely "working" when white jurors Pamela Chesteen and Bobby Lester volunteered them during the trial court's *voir dire*. Tr. 986; 799.

by race neutral reasons, but their analyses of each of the other four African-American jurors diverge. For each of those four jurors, the majority recited the reasons Evans gave for each strike, and finding some record support for at least one of the reasons he proffered, concluded that the strike was not pretextual. In contrast, the dissent did not stop with the facially plausible reason, but went on to consider proffered evidence of prevarication.

A full appreciation of the difference between the approaches of the majority and dissent requires a side by side reading of their respective opinions. However, their views on the strike of Carolyn Wright are illustrative. The majority's conclusion is unequivocal: "Flowers's claim that the State provided 'no convincing reasons' for striking Wright is simply unfounded. Wright had worked with Flowers's father, she knew thirty-two of the potential witnesses, and she had been sued by Tardy Furniture."[16] *Flowers VI(B)*, 240 So.3d at 1127; *Flowers VI(A)*, 158 So.3d at 1049. Problems with each of these reasons, however, were pointed out by the dissent. Regarding the "working relationship" with Flowers' father, the dissent noted:

> Although the State cited Wright's working relationship with Archie Flowers as a basis for its strike, the State made no effort during *voir dire* to question Wright about the working relationship beyond a general question as to whether the relationship would affect her ability to serve as a juror. One could easily assume that the two worked in different departments and during different shifts. Further, Wright stated during group *voir dire* that she was unaware of whether Archie Flowers still worked at Wal-Mart or if he had retired. This supports an inference that Wright and Flowers did not have a close working relationship. The lack of questioning related to this basis is suspect.

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[16] The majority also "note[d]" that "on her juror questionnaire, Wright wrote that she had previously served as a juror in a criminal case involving the "Tardy Furniture trial." Evans, however, did not state this as a reason for striking Wright, and it therefore cannot support the strike. *See Miller-El II*, 545 U.S. at 252 ("If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.").

240 So.3d at 1163 (King, J., dissenting); 158 So.3d at 1092 (King, J., dissenting).

Regarding the second cited reason, Wright's acquaintance with potential witnesses, the dissent cited to dispositive facts about comparable white jurors: accepted white juror Chesteen "knew thirty-one people involved in Flowers's case;" accepted white juror Waller "knew eighteen people involved in the case;" and accepted white juror Lester "knew twenty-seven people involved in the case." *Flowers VI(B)*, 240 So.3d at 1162 (King, J., dissenting); *Flowers VI(A)*, 158 So.3d at 1091 (King, J., dissenting).[17]

Finally, with respect to the prosecution's stated reason that Wright had both been sued and had her wages garnished by Tardy's furniture store, the dissent found that reason also suspicious, both because Wright had stated that the litigation was "paid off" and would not affect her as a juror, and because *"[t]here is nothing in the record supporting the contention that Wright's wages were garnished."*[18] *Flowers VI(B)*, 240 So.3d at 1162; *Flowers VI(A)*, 158 So.3d at 1091.

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[17] At an earlier point, the majority had acknowledged the existence of accepted white jurors who also knew many of the witnesses, but rationalized that "the number of acquaintances was not the sole reason given by the State, so the basis is not an automatic showing of pretext." *Flowers VI(B)*, 240 So.3d at 1126; *Flowers VI(A)*, 158 So.3d at 1049. However, this statement hardly explains why the majority would later in the opinion list the number of acquaintances as a "convincing reason" for her strike. Nor does it explain why the court did not count the comparison as evidence of pretext, even if not dispositive of the question.

[18] The majority acknowledged that the record did not support the contention that Wright's wages had been garnished, but dismissed it as irrelevant because "that does not change the fact that being sued by Tardy Furniture was a race-neutral reason for striking Wright." *Flowers VI(B)*, 240 So.3d at 1127; *Flowers VI(A)*, 158 So.3d at 1050. In the dissent's view, however, the mischaracterization was significant:

> The State did mischaracterize its basis for the peremptory strike. Further, unlike [another factual misstatement by Evans regarding juror Wright, one that alleged her acquaintance with one of Petitioner's relatives], the statement that Wright had her wages

The two opinions' treatment of the other three struck jurors is similarly discordant. The majority is correct that for each struck juror Evans cited at least one reason with record support that did not precisely apply to a white juror he had accepted. But given the backdrop of Mississippi Supreme Court's opinion in *Flowers III* and the rest of Evans' history in this case, only the most unsophisticated prosecutor would not have had such a reason at hand. And given that backdrop, the dissent was correct that a facile inquiry was insufficient:

> Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination.

Flowers VI(B), 240 So.3d at 1160 (King, J., dissenting); (quoting *Miller-El II*, 545 U.S. at 239-40 (citing *Batson*, 476 U.S. at 96-97)); *Flowers VI*, 158 So.3d at 1088 (King, J., dissenting) (quoting *Miller-El II*, 545 U.S. at 239-40 (citing *Batson*, 476 U.S. at 96-97)). "If anything more is needed for an undeniable explanation of what was going on, history supplies it." *Miller-El II*, 545 U.S. at 266.

> garnished seems to go directly to reasoning for the State's strike—that Wright would have some sort of ill will toward Tardy's as a result of her wages being garnished. It is easy to imagine that litigation which ends in friendly terms—for example, a settlement—might result in the parties having different feelings toward one another as opposed to a suit which results in garnished wages. As such, the State's unsupported characterization of the lawsuit is problematic.

Flowers VI(B), 240 So.3d at 1163 (King, J., dissenting); *Flowers VI(A)*, 158 So.3d at 1091 (King, J., dissenting).

III. THIS COURT SHOULD GRANT CERTIORARI TO ENSURE THAT LOWER COURTS CONSIDER ALL FACTS BEARING ON THE CREDIBILITY OF THE STATE'S ASSERTED REASONS FOR A STRIKE.

"[T]he very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication." *Miller-El II*, 545 U.S. at 238 (quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991), and citing *Georgia v. McCollum*, 505 U.S. 42, 49 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991); *Batson*, 476 U.S. at 87)). Here, the specter of cynicism has two faces. Not only did Evans' discrimination in jury selection threaten public confidence in jury neutrality, his avoidance of the rule of law by thinly veiled pretext threatens public confidence in the effectiveness of the courts at enforcing the law.

While disputes over the weight that should be accorded to various indicia of racial motivation are not uncommon, Flowers is aware of no other case in which a lower court has refused to *consider* any of the factors that this Court has deemed relevant. Moreover, the particular factor the state court dismissed as "not undermin[ing] Evans' race neutral reasons" is not only one of those recognized by this Court in *Miller-El*, but one that is inextricably connected with the question of pretext. Certainly, as *Miller-El* recognized, the prior history of the prosecuting office is relevant for its value in establishing *propensity to discriminate*. But the prior history of the prosecutor himself is also relevant in another way: his propensity to give false explanations (or, at the very least, his vulnerability to gross self-delusion), which, in turn, is closely related to the central issue of the credibility of his purported reasons for his strikes. *Snyder*, 552 U.S. at 477 (citing *Batson*, 476 U.S. at 98, n. 21) (observing that step three of the inquiry required evaluating the prosecutor's credibility); *Hernandez*, 500 U.S. at 365 (question at *Batson*'s third step is whether

prosecutor's proffered reasons "should be believed"). For a court to *dismiss* the unreliability of a prosecutor's prior statements on a *very closely related matter* is such a gross deviation from ordinary fact-finding that it displays a lack of appreciation for the importance of the inquiry. Such laxness in enforcement of the Equal Protection Clause of the Fourteenth Amendment must be corrected.

Finally, permitting a court to ignore a prosecutor's history of deliberate violation of the command against racial discrimination has a particularly pernicious effect on deterrence. A prosecutor with such a history – particularly a prosecutor with an adjudicated history of persisting in discrimination after the first finding of racially motivated exercise of his peremptory challenge – is exactly the person who can only be motivated by consequences, not by principle. The Mississippi Supreme Court's unintended message to such a person is: Just be careful to cover your tracks.

This Court should grant certiorari to make plain to the lower courts that they may not ignore any indicium of discrimination, and to make plain to prosecutors who are caught disobeying the command of the Equal Protection Clause – or who contemplate such disobedience – that flouting the Constitution will not be rewarded.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should grant certiorari

Respectfully submitted,

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